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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946.

No. 1071

DELLA HOOK, Administratrix of the Estate of Jacob Hook, Deceased,
Petitioner,

vs.

NATIONAL BRICK COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OWEN W. CRUMPACKER,
JAY E. DARLINGTON,
300 Hammond Building,
Hammond, Indiana,
Attorneys for Petitioner.

FREDERICK C. CRUMPACKER,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

Statement of Matter Involved.

Petitioner respectfully represents to the court that she recovered a verdict and judgment in the District Court for the Northern District of Indiana, in the sum of Ten Thousand Dollars ($10,000.00) for the wrongful death of her husband. Jurisdiction was based upon diversity of citizenship. By two to one decision, this verdict and judgment were reversed generally and without direction

(Tr. 1 and 2) by the United States Circuit Court of Appeals for the Seventh Circuit, because of alleged error of the District Court in the admission of certain evidence and the lack of sufficient evidence to support the verdict. *Della Hook, Administratrix* v. *National Brick Company* (1945) 150 F. 2d 184. (See opinion in appendix). Without a further trial and of its own motion the District Court entered judgment upon remand in favor of the defendant (respondent). (Tr. 3-5 inc.) On further appeal this action of the District Court was affirmed with opinion (Tr. 18-19). (Opinion printed in appendix). It is this decision which your petitioner assigns as error, and earnestly prays that this court issue a writ of certiorari to review.

Jurisdiction to Review.

Your petitioner respectfully represents further that this court has jurisdiction to review the judgment in question under Section 240 (a) of the Judicial Code as amended by Act of Congress under date of February 13, 1925. 43 Stat. 936, 28 U. S. C. A. 350. The judgment complained of also involves what your petitioner earnestly contends to be an erroneous construction of Rule 50b of the Federal Rules of Civil Procedure.

The judgment sought to be reviewed was rendered on November 6, 1946 (Tr. 18). A petition for rehearing was duly filed on November 21, 1946, (Tr. 21) and denied on December 3, 1946 (Tr. 21). This petition is being filed within three months after the judgment (deducting the period during which the time for the filing of this petition was suspended by the pendency of the petition for rehearing). *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498, 48 S. Ct. 112. The judgment of the Circuit Court of Appeals was final and may be reviewed by certiorari. *Huguley Mfg. Co.* v. *Galeton Cotton Mills,* 184 U. S. 290, 22 S. Ct. 252.

Petitioner further states that the questions involved are of peculiar gravity and of general importance to the practice. The judgment of the District Court, as affirmed by the Circuit Court of Appeals, in a purported effort to avoid re-trials, has gone to extremes not yet found in the written opinions, in holding that a general reversal of a verdict and judgment authorizes the District Court to peremptorily enter judgment in favor of the losing party upon remand without a jury trial and upon its own motion. Further, the Circuit Court of Appeals in its decision and opinion purports to require a novel procedure not heretofore sustained by authority (and, in fact, denied by authority), of having a "pre-trial" trial in a jury case after a general reversal, in spite of the fact that the Federal Rules of Civil Procedure contain no such provision. Again, *Rule* 50b of the Federal Rules has been before this Court often in recent years for clarification, but the decisions of the Circuit Courts of Appeal have been reversed in each instance upon other grounds, and without passing upon the procedural matters involved. *Conway* v. *O'Brien*, 312 U. S. 492, 61 S. Ct. 634, *Berry* v. *U. S.*, 312 U. S. 450, 61 S. Ct. 637; *Halliday* v. *U. S.*, 315 U. S. 94, 62 S. Ct. 438. The instant case clearly demonstrates the very important need for further clarification of the Rule: Assuming the Circuit Court had power to direct the entry of a judgment in favor of the losing litigant in a jury case *but failed to do so*, does the District Court succeed to that power on general reversal and remand without specific delegation because of *Rule* 50b?

Appended hereto are the relevant opinions of the District Court and the Circuit Court of Appeals.

Questions Presented.

Your petitioner represents that there is substantially only one question presented: The error of the Circuit Court of Appeals in affirming the action of the District Court in, peremptorily and of its own motion, entering judgment for the defendant in a jury case without a further trial after a general reversal and remand without direction of a verdict and judgment in favor of the plaintiff (your petitioner).

Reasons for Allowance of Writ.

Petitioner submits the following reasons for the allowance of the writ of certiorari:

1. The Circuit Court of Appeals for the Seventh Circuit in deciding a federal question ignored at least two ruling precedents of this Court, namely; *Slocum* v. *New York Life Insurance Company,* 228 U. S. 364, 33 S. Ct. 523, and *Rodgers* v. *Hill,* 289 U. S. 582, 53 S. Ct. 731.

2. The decision questioned is in direct conflict with the decisions of the other Circuit Courts of Appeal, and particularly the decision of the Circuit Court of Appeals for the Eighth Circuit in *Illinois Power & Light Corp.* v. *Hurley* (1931,) 49 F. 2d 681. Also *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Company* (1942), 127 F. 2d 837 (5th CCA); *Fleniken* v. *Great Amer. Indemnity Co.* (1944), 142 F. 2d 938 (5th CCA); *Roth et al.* v. *Hyer* (1944), 142 F. 2d 227 (5th CCA).

3. The decision of the Circuit Court of Appeals has sanctioned so far a departure from the usual course of judicial proceedings by a District Court as to call for an exercise of this Court's power of supervision. The District Court interprets *Rule* 50b of the Rules of

Civil Procedure to mean that where a verdict and judgment have been reversed generally and without express direction, there is an implied direction that a motion *non obstante veredicto* made prior to the appeal and denied should be reinstated, reconsidered, and sustained without further consideration. The only remedy in practice for such an interpretation of *Rule* 50b is for the prevailing party in a jury case to file a motion for new trial and assign cross-errors on appeal. In other words, such a party must impeach a verdict in his favor in order to avoid the otherwise fatal consequence of a general reversal without direction.

Again, although the District Court denied the contention of your petitioner that she be allowed to present new and additional evidence, (see appendix) the Circuit Court of Appeals, in its opinion (Tr. 19), prescribed the rather novel procedure of a "trial within a trial" in a jury case after a general reversal. Apparently, the court directs a procedure in which the party shall first try the case before the court and then, depending upon the court's decision, re-try it before the jury.

Both of the above procedures upon scrutiny are futile from the standpoint of practicing attorneys charged with the primary responsibility to the litigants, and, who, prior to these decisions, understood a "general reversal" to mean just that.

4. The decision of the District Court as affirmed by the Circuit Court of Appeals places a new and erroneous construction on *Rule* 50b of the Federal Rules of Procedure. While recent decisions have held that the reviewing court has power to direct judgment in favor of the losing party in the court below in a jury case under *Rule* 50b, the decision sought to be reviewed goes further in holding that where the reviewing court has not exer-

cised this power it is re-delegated back to the trial court after reversal.

5. Your petitioner has been deprived of her constitutional right to a jury trial. A general reversal without direction places the case back before the trial court as though no trial had occurred. While the trial court is bound by the law established on appeal as it applies to the second trial, it cannot ignore the right of a jury determination upon the disputed facts involved, and cannot forthwith enter complete and final judgment against the plaintiff and in favor of the adversary.

Conclusion.

WHEREFORE, your petitioner respectfully prays that her petition be granted, and that a writ of certiorari issue, pursuant to this petition, to the Circuit Court of Appeals for the Seventh Circuit directing it to send up the record of the proceedings had there in this cause for review by this Honorable Court.

Della Hook, Administratrix of the
Estate of Jacob Hook, Deceased.

By OWEN W. CRUMPACKER,
JAY E. DARLINGTON,
Her Attorneys.

FREDERICK C. CRUMPACKER,
Of Counsel.

IN THE

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No.

DELLA HOOK, Administratrix of the Estate of Jacob Hook, Deceased,
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May It Please the Court:

Official Reports.

The opinion and judgment in the first appeal appears in 150 F. 2d 184. The District Court's memorandum opinion appears in the printed transcript filed in this court at pages 3 to 5 inclusive, and 68 F. Supp. 740. The opinion of the Circuit Court of Appeals in the second appeal appears in 158 F. 2d. 86. For the convenience of the court these three opinions are set forth *verbatim* in the appendix to this petition and brief.

Concise Statement of Jurisdiction.

The concise statement of this court's jurisdiction appears in the formal petition, *supra*.

Specification of Errors.

The only error specified appears in the formal petition under "Questions presented," *supra*.

ARGUMENT.

Conflict With Precedents of This Court.

Petitioner has consistently argued that the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 33 S. Ct. 523, has never been overruled in so far as it authorized and required a new trial in the District Court after the general reversal of the verdict and judgment originally rendered in your petitioner's favor. Respondent in appealing from the adverse decision assigned numerous specifications of error including the denial of its motion *non obstante veredicto.** All it sought on appeal was a general reversal. In granting this prayer the Circuit Court of Appeals quite obviously was concerned in its opinion (see appendix) with only two errors specified, namely: error of the trial court in admitting evidence of the defective condition of three hooks and the insufficiency of the evidence to sustain the charges of negligence. Its mandate directed "such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding." (Tr. 2) Thereupon, the trial court entered final judgment (Tr. 5 and 6). That the *Slocum* case was completely ignored can be readily seen by a cursory reading of the attached opinions.

*Your petitioner takes exception to the Circuit Court's statement in the second appeal that "the error assigned was the overruling of a motion for a directed verdict and the denial of a motion for judgment notwithstanding the verdict" (Tr. 18). Such a mis-statement tends to support the District Court's action by smothering the actual fact that there were sixteen separate and independent errors assigned in the initial appeal. While the specifications of error appear only in the transcript in the first appeal, which is not before this court, the above statement is directly impeached in the opinion in the first appeal (see appendix, page 20).

In so far as the *Slocum* case pertains to the effect of a general reversal without direction, we quote the following language of Mr. Justice Van Devanter appearing therein (33 S. Ct. page 537).

> "That judgment the Circuit Court of Appeals reversed, and rightly so, because the defendant's request, in the state of the evidence, ought, as matter of law, to have been granted. *The reversal operated to set aside the verdict and to put the issues at large, as they were before it was given.*" (Italics ours.)

In substance the court decided that the Circuit Court of Appeals had no authority to direct judgment for the defendant, and that the *7th Amendment of the Constitution made a new trial mandatory. This opinion* was modified in *Baltimore & Carolina Line* v. *Redman, Inc.* (1935) 295 U. S. 654, 55 S. Ct. 890 in so far as the power of the Circuit Court of Appeals to direct a judgment of dismissal under the particular circumstances was involved, Mr. Justice Van Devanter again writing the opinion. Pursuant to this modification placed upon the rule in the *Slocum* case, *supra,* the court later held in *Montgomery Ward & Company* v. *Duncan,* 311 U. S. 243, 61 S. Ct. 189, that *Rule* 50b merely rendered unnecessary a request for the reservation of the question of law on a motion for a directed verdict. It decided that in all cases brought under the new rules the reservation of the law question was automatic, and that, therefore, from a procedural standpoint, all cases came within the rule of the *Redman* case, *supra.* In effect it decided that the appellate court has two alternatives (61 S. Ct. at page 195):

> "The appellate court may reverse the former action and itself enter judgment n.o.v. or it may reverse and remand for a new trial for errors of the law."

In the instant case respondent neither waived nor withdrew its motion for a new trial, nor did it elect to stand only upon its motion n. o. v. on appeal. The Circuit Court of Appeals decided that there was error of law at the trial (which error could be corrected only through a new trial), and also that the evidence was insufficient. However, it followed neither of the alternatives authorized in *Montgomery Ward & Company* v. *Duncan, supra*. Therefore, we contend that pursuant to the unmodified portion of the *Slocum* decision, the case on remand rested as though no trial had occurred, and the District Court was bound to set it for trial upon its trial calendar instead of summarily entering judgment for respondent.

It is contended further that the decision in *Rodgers* v. *Hill* (1933) 289 U. S. 582, 53 S. Ct. 731, has also been ignored. We merely quote the pertinent part of that decision regarding the construction of mandates (53 S. Ct. p. 734):

> "Moreover, if the court intended to direct dismissal, it is presumed that it would have done so unequivocally and directed by means of language, form of decree and mandate generally employed for that purpose. But assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showings made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought by his bill of complaint. (Citing authorities)."

The absence in the opinion and mandate of the appellate court of any direction to enter judgment for the respondent is particularly significant when regarded in the light of the quoted language, and the full powers given courts of review under *Rule* 50b.

Conflict Among Circuit Courts of Appeal.

Prior to the enactment of the Federal Rules of Civil Procedure the Circuit Court of Appeals for the Eighth Circuit held in the case of *Illinois Power & Light Corporation* v. *Hurley* (1931), 49 Fed. 2d 681, at page 683, that:

> "The action being one at law the reversal of the judgment entitled the parties to a new trial of the action without restriction or limitation * * *. This court, in reversing the prior judgment, did not purport to place any such conditions or restrictions upon plaintiff, and the trial court had no authority to require plaintiffs in a preliminary hearing before the court without a jury, to prove that they had a case for the jury."

An examination of this case reveals a trial and appellate history identical with the case at bar. In its opinion in the instant case (see appendix) the Circuit Court of Appeals neither analyzed, nor distinguished nor even referred to the existence of such law, although it is a clear enunciation of a well recognized and uncontradicted rule.

After the adoption of the new rules the Circuit Court of Appeals for the Fifth Circuit rendered three opinions in accordance with the rule of the *Hurley* case, *supra*: *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Company* (1942), 127 Fed. 2d. 837; *Roth* v. *Hyer* (1944), 142 F. 2d. 227, and *Fleniken, et al.* v. *Great American Indemnity Company* (1944) 142 F. 2d. 938. Of these three cases, the current opinion of the Circuit Court of Appeals refers only to the *Madden Furniture* case, and then only to quote a portion of the language of the decision not applicable to the question before it. It ignored the fact that the decision required a trial of the case *de novo*, and

that the motions for judgment were held not reinstated, but stood disposed of.

In *Roth* v. *Hyer, supra,* the court said at page 228:

> "Generally when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues the whole case is tried anew, in pursuance of the principal of law disclosed in the opinion of the appellate court which must be regarded as the law of the case on the second trial."

In the *Fleniken, supra,* case a verdict was reversed because a motion for a directed verdict should have been granted. On remand the court entered judgment for the defendant. On further appeal the court held that the District Court erroneously construed the mandate, and that plaintiff was entitled to ask for a trial *de novo.* Wih this decision in mind we call the court's attention to the statement of the District Court in the present case from which we quote as follows: (Tr. 5)

> "In that connection the plaintiffs argued that they should have been given the opportunity to adduce additional evidence to supply the deficiency found by the Appellate Court, or to explain away the evidence found to bar the one plaintiff's recovery. The answer is that had the District Court ruled at the trial as the Circuit Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded."

There can be no question but that the decisions mentioned above clearly establish the right of the petitioner to a new trial upon the general reversal of her verdict and judgment, or, at least, her right to present to the District Court considerations which might warrant the granting of a new trial, if it be regarded as a discretion-

ary matter. Not only has the Circuit Court of Appeals ignored the decisions cited, but it has failed to cite a single authority to the contrary among the ten authorities mentioned.

Its decision, therefore, stands alone and in direct conflict with the cases discussed.

Departures in Procedure.

The District Court, without anything before it other than the mandate and opinion of the reviewing court, summarily entered judgment in favor of the defendant (Tr. 5). Since the mandate contained no express direction, the only theory to sustain its action is that there was an implied direction to so enter judgment. The Circuit Court of Appeals sanctioned this so-called direction by implication:—"We think the court correctly construed the opinion and mandates and properly disposed of appellants' contentions" (Tr. 19). But there was nothing before the court upon which it could act affirmatively under the then existing procedure. The motion for judgment n. o. v. was not reinstated by the reversal but stood disposed of. *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co., supra.* As stated in *Fleniken* v. *Great American Indemnity Company, supra,* at page 939: "The reversal on appeal of said final judgment, with a remand for further and not inconsistent proceedings, did not reinstate the motion of the defendant for a directed verdict and, in the alternative, for a new trial, which motion had been overruled before the appeal was taken." The decision sought to be reviewed is, thus, a substantial departure from existing practice.

A further departure of a substantial nature is suggested by the opinion of the Circuit Court of Appeals.

Petitioner was apparently penalized, as reflected in the opinion, because she "made no offer to produce any evidence not before heard" (Tr. 19). The Circuit Court also states: "Comparing *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co.* * * * after the mandate had been filed appellants offered to exhibit evidence not before heard which might produce a different result" (Tr. 19).

With regard to the *Madden* case the Circuit Court merely seized upon a statement from the reviewing court's resume' of the facts to justify its affirmance here, because the Court in the *Madden* case makes no comment in the body of the opinion upon the propriety or impropriety of such a preliminary showing. That your petitioner was between "Scylla and Charybdis" is shown by the trial court's view in the matter: "In that connection plaintiffs argue that they should be given the opportunity to supply the deficiency found by the appellate court * * *. The answer is that had the District Court ruled at the trial as the Circuit Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded" (Tr. 5).

The prior written law on this subject is clearly stated in *Illinois Power & Light Co.* v. *Hurley, supra,* pages 683 and 684:

> "The defendant, however, interposed a motion to dismiss, unless plaintiffs should show that they had available additional noncumulative evidence, pertinent and substantial and newly discovered, and unobtainable at the time of the prior trial. * * * Counsel cite new authority for such a procedure, and we conclude that there is none. Such a procedure would seem to be in direct violation of the Seventh Amendment of the Constitution. (citing *Slocum* case and others) * * * the trial court had

> no authority to require plaintiffs, in a preliminary hearing before the court and without a jury, to prove they had a case for the jury. The motion was not only unique but, we think, *was properly treated as frivolous.*" (Italics ours.)

As mentioned, a fair interpretation of the opinion in the first appeal is that the District Court erred in allowing evidence of defective hooks and its denial of the motion for a directed verdict as re-urged in the motion n. o. v., although the court in the majority opinion did not refer to any specific rulings in holding the evidence insufficient to sustain the charges of negligence. That there was a substantial difference of opinion, even in the reviewing court, is indicated in the dissenting opinion. The trial court, at least, was satisfied that a fair trial had been had, and that the verdict was in accordance with the weight of the evidence, since it denied defendant's motion for new trial as well as the motion n. o. v. (Tr. 4, par. 7). Could it not be argued with equal force that "had the District Court ruled as the Circuit Court of Appeals held it should have ruled" on the question of admissibility of evidence, the plaintiff might have introduced further evidence that would have filled in the gap? The defective hooks found at the scene of the injury were vital items of evidence—the Circuit Court of Appeals cut this evidence out of the case and found the residue insufficient.

The above suggested procedures present baffling problems to practicing attorneys in the trial courts. Apparently, a successful litigant must impeach a favorable verdict and judgment to insure against a general reversal, because the only provisions for a motion for new trial (*Rules* 50b and 59) (in which the prejudicial rulings of the court could be raised) requires it to be filed within ten days after verdict (or judgment under Rule 59). The pre-jury presentation of evidence after a gen-

eral reversal would lead to so many ramifications as to make it futile upon its face.

Erroneous Construction of Rule 50b.

Without setting out the terms of the rule, (See appendix) its apparent primary purpose is to permit the trial court to reflect upon the merits of a plaintiff's case after the immediate problems arising during the actual trial have been disposed of. By judicial interpretation this rule has given the reviewing court power to finally dispose of jury trials where the interests of justice so require. The decision in the present case construes the rule to permit the redelegation of that power back to the trial court. The result is apparent. It then becomes an instrument for the prevention of re-trials—whether meritorious, necessary, or otherwise—depending upon the pressing nature of the particular court's calendar at the time the problem arises.

The Seventh Amendment.

As so ably stated by the late Mr. Justice Van Devanter in the *Slocum* case, *supra*, the constitutional right to a trial by jury of issues of fact in civil cases has always been guarded with jealousy by this Honorable Court. The committee of judges and lawyers that recommended the adoption of *Rule* 50b by this court was fully aware of its possible abuse in so far as the denial of the right to a jury trial was concerned.* The record and opinions sought to be reviewed here present a most clear illustration of that feared abuse.

*See order of this court under date of June 3, 1935, October Term, 1934, appointing advisory committee: "while maintaining inviolate the right of trial by jury. * * *"

Conclusion.

Your petitioner is not seeking to re-argue the evidence in her case in this court. She has brought to this Honorable Court's attention an ignoring of precedents by the Circuit Court of Appeals for the Seventh Circuit, a conflict of decisions among the circuits, a wide departure in the practice not heretofore sanctioned, a new and erroneous construction of the Federal Rules of Procedure, and a violation of the Constitution by judicial decisions, all of which pertain to a question of procedure and practice of grave and general importance to the bench and bar.

For all of which reasons, your petitioner prays that her petition be granted.

Della Hook, Administratrix of the
Estate of Jacob Hook, Deceased.

By Owen W. Crumpacker,
Jay E. Darlington,
Her Attorneys.

FREDERICK C. CRUMPACKER,
Of Counsel.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

SEVENTH CIRCUIT.

Hook v. National Brick Co.

No. 8722

Rehearing Denied July 12, 1945.

June 8, 1945

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division; Luther M. Swygert, Judge.

Action by Della Hook, administratrix of the estate of Jacob Hook, deceased, against National Brick Company, to recover for death of plaintiff's decedent alleged to have been caused by defendant's negligence. From a judgment for plaintiff, the defendant appeals.

Reversed.

Wm. Greene, of Chicago, Ill., and Robert H. Moore and Oscar B. Thiel, both of Gary, Ind., for appellant.

Owen W. Crumpacker and Frederick C. Crumpacker, Jr., both of Hammond, Ind., for appellee.

Before Major, Kerner, and Minton, Circuit Judges. 150F. 2d-184.

Major, Circuit Judge.

This appeal is from a judgment, in an action to recover damages for the death of plaintiff's decedent, alleged to have been caused by defendant's negligence. The judgment, favorable to plaintiff, followed a jury trial.

Defendant urges three grounds for reversal: (1) the insufficiency of the evidence to sustain the judgment, raised by the court's refusal to direct a verdict in favor of the defendant, and the court's denial of defendant's motion for judgment *non obstante veredicto;* (2) the erroneous admission of evidence; and (3) the insufficiency of the allegations of the complaint relative to decedent's earning capacity.

Defendant was engaged in the making, storing and selling of brick for construction and similar uses in and about Lake County, Indiana. Plaintiff's decedent was engaged in the business of buying, selling and hauling brick and other building material. Jurisdiction is based upon diversity of citizenship.

Inasmuch as the primary question for decision arises from defendant's contention that the proof is insufficient to sustain plaintiff's cause of action, we shall relate the evidence in some detail. The defendant offered no testimony. Plaintiff's proof, insofar as it relates to the manner in which plaintiff's decedent met his death, was furnished by three witnesses, Heintz, Kirsch and Bultge, all employees of the defendant at the time of the fatal occurrence.

Late in the forenoon of September 15, 1943, Jacob Hook (plaintiff's decedent) drove his truck to defendant's kiln shed for the purpose of purchasing a load of brick from defendant. Defendant, through its employees Kirsch and Heintz, with the assistance of the decedent, proceeded with the loading operation, during the course

of which a box of brick struck plaintiff's decedent in the forehead, causing injuries from which he died a few days later. Decedent left surviving him his widow, Della Hook, 53 years of age, three sons and one daughter. All of the children were of age except one who, together with his mother, was wholly dependent upon the decedent for support.

The loading operation in which the decedent had participated on numerous previous occasions consisted of lifting a box of brick weighing four tons by means of a crane and cables, and dumping the brick into the truck to be loaded. There were four cables attached to the crane, each ½" in diameter and made of strands of fine steel wire, with a hook on each cable to be inserted in angle irons near each corner of the box. They were designed to operate so that all four would rise simultaneously, thus raising the box of brick evenly from the floor as it was being moved to dump in the truck. A timber 4 x 4 was placed at right angles across the body of the truck and loading accomplished in the following manner: the crane lifted the box of brick, carried it over the truck and lowered it onto the timber, about one-fourth of the box being forward of and three-fourths to the rear of the timber. When the box came to rest on this timber, the craneman allowed sufficient slack so the front cables could be unhooked and chains about one and one-half feet in length inserted between the ends of the two forward cables and the angle irons at the front of the box. These chains had a ring at one end into which the hooks of the cables were inserted and hooks were at the other end for insertion in the angle irons on the box. The purpose of this mechanism was to provide sufficient slack in the front cables so that the crane when operated would lift the rear end of the box

and at the same time lower the front end, thereby causing the bricks to fall onto the truck. Three men were required to perform the operation, the craneman and a hooker to insert the chains on each side of the forward end of the box.

The operation just described was followed on the occasion of the accident. Decedent located his truck near the crane and a timber was placed across the body of the truck. Heintz, the craneman, caused the box of brick to be picked up, carried over to the truck and lowered upon the timber. Kirsch and the decedent handled the chain or hooking operation, one on each side of the truck. Kirsch was in view of Heintz, the craneman, but neither Kirsch nor Heintz could see the decedent. Kirsch hooked the chain on his side; Heintz waited until the decedent called, "All right, Bill," and then lifted the box about eight inches. Suddenly the box swung toward decedent and knocked him to the ground. The only cable hooked to the box after the accident was the rear cable on Kirsch's side.

The acts of negligence alleged and relied upon are that defendant (1) failed to inspect the cables on the crane, knowing that they had been used beyond their capacity by the North Pier Terminal Company; (2) permitted the cables to become stretched so that the box would not be lifted evenly, thereby causing the box to swerve toward and strike the decedent; and (3) failed to maintain the crane and cables in a condition of repair sufficient to prevent injury to decedent, in view of all the circumstances, including the fact that defendant knew or should have known that the cables would become stretched and the hooks at the end of the cables bent because of the use of the equipment by the North Pier Terminal Company in storing material heavier than the capacity load of the crane and cables.

In view of the importance which plaintiff attaches to the use of defendant's equipment by the North Pier Terminal Company, it seems pertinent to note the facts relative thereto. This company about nine months prior to the accident, commenced the use of defendant's cranes and equipment for loading and storing merchandise and material in defendant's storeroom. Defendant had three cranes, including the one involved in the instant case, all of which were used at various times by the Terminal Company. The cranes had a lifting capacity of five tons but freight was sometimes handled which weighed seven or eight tons, and on some occasions only two cables of a crane were used. This use of the cables on some occasions caused them to stretch. There was a disagreement between the Terminal Company and defendant as to why should keep in repair the cables and equipment. There was finally an understanding that each company should take care of the cables it broke. It was also shown that the hooks on the cables became bent through use by the Terminal Company. When this happened, they were repaired by defendant.

In connection with the testimony as to the use by the Terminal Company, it is pertinent to note that there is not a scintilla of evidence that any defect in the cables or hooks caused by the Terminal Company's use existed on the occasion of the accident. In fact, there is no evidence that the cables and hooks of the crane used on the occasion of the accident were ever damaged by the Terminal Company's use. The most that can be said is that all three of the cranes were used at some time by the Terminal Company and that some of the cables and hooks on some of the cranes were damaged. There is no proof as to when the cranes or any of them were last used by the Terminal Company prior to the accident.

For all that is disclosed, it might have been a day, a week, or six months. The only testimony as to the condition of the crane, cables or hooks at the time of the accident was that of Heintz, who testified that when he picked up the box of brick the crane was in proper order and the cables and hooks were all right, that they were all in good working condition. There is no proof that the crane, cables or hooks were in a defective condition prior to the accident, and there is no proof that any of the cables or hooks broke during the operation in question, or that the cables stretched, or that either the cables or hooks were in a defective condition immediately after the accident.

(1, 2) There is the statement by Heintz that on one occasion two front cables stretched so that they were four inches longer than the two back cables. It is not shown, however, that these were the cables or the crane in use at the time of the accident; furthermore, the occasion about which he testified was two weeks subsequent to the accident. Defendant's motion to strike this testimony should have been allowed; it neither proved nor tended to prove the negligence relied upon. There is the further testimony of the witness Bultge, admitted over defendant's objection, that about one week after the accident he found three hooks, detached from cables, in a defective condition. The witness had no knowledge whether they had been removed from the cables of the crane involved in the accident or from the cables of the other cranes. This evidence has no probative value and, in our opinion, was erroneously admitted.

(3, 4) We are not unmindful of the rule in Indiana, as elsewhere, that the evidence must be considered in a light most favorable to the plaintiff, together with all inferences which may be reasonable drawn therefrom.

Danner v. *Marquiss,* 218 Ind. 441, 33 N. E. 2nd 511; *Pfisterer* v. *Key,* 218 Ind. 521, 33 N. E. 2d 330; *Superior Meat Products* v. *Holloway,* 113 Ind. App. 320, 48 N. E. 2d 83. According to plaintiff the full benefit of this rule, we think there is an entire want of proof of any defect in defendant's equipment which caused decedent's injury and death. The mere fact that an accident happened is not proof of a defective condition alleged in the complaint.

There is proof, however, that defendant failed to inspect the cables prior to the accident. Heintz, the same witness who testified that the equipment was all in proper operating condition at the time of the accident, also testified that the cables had not been inspected during the nine months prior thereto. This raises the question whether defendant's failure to inspect the cables constituted negligence which will support the judgment. In considering this question, it must be kept in mind there is no proof as to what caused the box to swerve and strike the decedent. What, if anything, an inspection would have disclosed under such circumstances is purely a matter of conjecture. As pointed out by defendant, it is just as reasonable to infer that an inspection would have revealed the cables in good condition as that it would have revealed a defective condition.

(5,6) No Indiana case has been cited and we are unable to find one which has announced the rule applicable to such a situation. In Restatement of the Law, Vol. Torts, Chap. 12, Par. 300, it is stated:

> "A failure to make an inspection does not create liability unless the inspection, if made, would have disclosed the particular defect which makes the use harmful to the other. * * * It is sometimes true that those who use certain instrumentalities are under a duty to make reasonable inspection thereof.

> The duty of inspection is not, however, ordinarily an independent duty upon which liability is based, but is a duty, the performance of which is a condition precedent to a reasonable use of the instrumentality. The actor's negligence lies in his act of using the defective instrument without adequate inspection, not in his omission to perform his duty of inspection."

In *Sack* v. *Dolese et al.*, 137 Ill. 129, 27 N. E. 62, the court considered the duty to inspect under circumstances somewhat similar to those of the instant case. There, the plaintiff, working in a stone quarry, attempted to stop a loaded car when the brake gave way and he was thrown to the ground. There was no proof of any defect in the brake or brake chain and no proof as to what had caused the brake to give way. It was contended there, as here, that defendant's failure to inspect was negligence. In denying recovery on this theory, the court (137 Ill. at page 133, 27 N. E. at page 63) stated:

> "The proposition goes on an unwarrantable assumption, to-wit, that an inspection would have discovered the defective condition of the brake. That is an affirmative proposition to be shown by the evidence, and the burden of proving it rests on him who asserts it. * * *but before a court or jury can say that their negligence in failing to inspect the car was the cause of plaintiff's injury, it must be shown by the evidence that the fault or defect in the appliance was one which a proper inspection would have made known to them." (A number of cases are cited and analyzed in support of this principle.)

On the basis of similar reasoning, the court in *National Builders Bank* v. *Schuham*, 319 Ill. App. 546, 49 N. E. 2d 825, denied recovery because of defendant's failure to inspect.

(7) We are of the view that the rule thus stated is controlling in the instant situation. If there had been

proof that the accident occurred because of a defective hook or broken or stretched cable, it might well be contended that an inspection would have revealed such condition. Such circumstances would present a jury question as to whether defendant's failure to inspect was the proximate cause of the accident. There being no proof, however, that the accident occurred because of a defective condition of the cables or the hooks, it cannot be inferred that a failure to inspect was negligence which caused the injury complained of.

We therefore conclude that the proof fails to sustain the negligence alleged in the complaint.

The judgment is reversed.

Kerner, Circuit Judge (dissenting).

I agree that, ordinarily, in an action to recover damages for personal injuries, the elements of which negligence consists must be proved by the plaintiff and the burden of proof rests upon him. True, negligence is not to be presumed solely from the fact that some event occurred causing injury. But, if it is shown that the injury complained of resulted from an accident which in itself is indicative of negligence, the happening of the accident, plus the attending circumstances, may be sufficient from which negligence may be inferred.

Here the complaint charged that defendant failed to maintain the crane and cables in a condition of repair sufficient to prevent injury to decedent. There was evidence that no inspection had been made of the cables and hooks for more than nine months prior to the accident; that prior to the accident the Terminal Company had used the crane and cables in question to lift material heavier than five tons causing the cables to stretch; and

that Heintz reported that fact to defendant's superintendent, who refused to repair the cables. There was evidence that the crane and cables were under the management of the defendant and there was evidence that the accident was such as does not ordinarily occur except in the absence of due care.

There was no evidence that decedent failed to properly hook the box at his corner or that any omission on his part was the cause of the accident. No one testified that decedent had not fastened the box properly and kept the short chains taut as Heintz raised the box. On the contrary, there was evidence that before the box was raised, the cables and hooks were taut; that Heintz could tell by the feel of his levers that the box had been hooked at all corners; and that it was not until the box had been raised eight inches that the box swerved and struck the deceased. In such a situation, in my opinion, the question of negligence on the part of the defendant was properly submitted to the jury. *Baltimore & Ohio Southwestern R. Co.* v. *Hill*, 84 Ind. App. 354, 148 N. E. 489; and *Cummings* v. *National Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

I would affirm the judgment.

On Petition for Rehearing.

Major, Circuit Judge.

A reading of plaintiff's petition for rehearing in connection with the proof which it is claimed we ignored does not change our opinion that plaintiff failed to establish the negligence relied upon. The following statement contained in our opinion is particularly criticized:

> " • • • it is pertinent to note that there is not a scintilla of evidence that any defect in the cables or hooks caused by the Terminal Company's use existed

on the occasion of the accident. In fact, there is no evidence that the cables and hooks of the crane used on the occasion of the accident were ever damaged by the Terminal Company's use."

It is asserted in the petition that this statement is directly contrary to plaintiff's evidence, and the testimony of two witnesses, Bultge and Heintz, is quoted in support of the assertion.

(8) The testimony of Bultge is that he admitted testifying before a coroner's jury: "Q. How would you endeavor to explain how it happened? A. Something went wrong with the cables."

How this proves or tends to prove the negligence alleged we are unable to discern. In the first place, it represents nothing more than the expression of an opinion improperly admitted over defendant's objection. In the next place, it throws no light on whether the cables stretched or broke or whether they were improperly attached to the box. This opinionated statement, in our view, does not constitute any proof of the negligence relied upon.

(9) The testimony of the witness Heintz which plaintiff calls to our attention follows:

"Q. Do you know whether or not they were using the crane in question to lift material, that is, as a matter of practice, which was heavier than five tons? A. Sure.

"Q. Do you know the weight of the material that they were lifting? A. Well, I seen them lifting eight tons.

"Q. In other words, as I understand it, I believe you said the capacity of the cable was five tons, is that right? A. Yes."

It is to be noted in connection with this testimony that it was not shown when the crane in question was used with reference to the time of the accident. It could have been the day before or six months before for aught that is shown. Furthermore, the fact that the crane was at some time used in lifting material heavier than its capacity is not proof that the cable or hooks were in a defective condition at the time of the accident.

(10, 11) Our opinion is also criticized for failure to discuss and apply the rule of *res ipsa loquitur*. The fact is that we considered this rule and thought it so plainly inapplicable as to require no discussion. Perhaps we were lulled into this belief by reason of the fact that plaintiff's able counsel did not mention or rely upon it in his original brief. It was only after an inquiry by a member of this court during oral argument that plaintiff's counsel made any claim that the rule was applicable. Plaintiff now relies upon *Talge Mahogany Co.* v. *Hockett*, 55 Ind. App. 303, 103 N. E. 815, and *Eker* v. *Pettibone*, 7 Cir., 110 F. 2d 451, as authority for her contention that the rule should be applied. In the rule includes the following element (55 Ind. App. 303, 103 N. E. 816): "* * * and it is made to appear that all the instrumentalities causing the accident are under the exclusive control and management of the defendant * * * The rule which we announced in the *Eker* case is to the same effect. See also *Indiana Harbor Belt R. Co.* v. *Jones*, 220 Ind. 139, 41 N. E. 2d 361; *City of Decatur* v. *Eady*, 186 Ind. 205, 115 N. E. 577, L. R. A. 1917E, 242; *Prest-O-Lite Co.* v. *Skeel*, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474; *Baltimore & Ohio Southwestern R. Co.* v. *Hill*, 84 Ind. App. 354, 148 N. E. 489.

The facts related in the opinion demonstrate beyond any doubt that the cables and hooks were not at the time

of the accident under the exclusive control and management of the defendant. In fact, plaintiff's decedent performed a substantial part in their control and management. Perhaps the most important part of the operation was the fastening of the cable hooks to the box and the decedent was directly charged with this responsibility as to the cables on his side of the box. Such being the situation, plaintiff is not entitled to the benefit of the *res doctrine.*

The petition for rehearing is denied.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JOSEPHINE M. MOSS, ADMINISTRATRIX of the Estate of Nicholas John Moss, Deceased, Plaintiff, vs. THE PENNSYLVANIA RAILROAD COMPANY, Defendant.	No. 397 Civil.
DELLA HOOK, ADMINISTRATRIX of the Estate of Jacob Hook, Deceased, Plaintiff, vs. National Brick Company, a corporation, Defendant.	No. 418 Civil.

Memorandum Opinion.

Both *Moss* v. *Pennsylvania Railroad Company* and *Hook* v. *National Brick Company* were actions to recover damages for the deaths of the Plaintiffs' decedents alleged to have been caused by the negligence of the respective defendants, and both cases were tried by jury.

At the close of all the evidence in the *Moss* case, the defendant railroad company filed a motion for a directed verdict which was overruled. The jury returned a verdict for the plaintiff upon which judgment was entered.

The defendant then filed a motion for a new trial and in the alternative for judgment on its motion for a directed verdict. This motion was denied.

At the close of the plaintiff's evidence in the *Hook* case, the defendant brick company filed a motion for a directed verdict which was overruled. The jury returned a verdict for the plaintiff. The defendant then filed a motion for a new trial and also a motion for judgment *non obstante veredicto*. The latter motion was overruled, and judgment was entered on the verdict.

Both of these cases were reversed on appeal. The defendants now move for judgments on the mandates, but the plaintiffs contend that they are entitled to new trials.

The only question presented is the effect of the mandates; that is, whether, in the absence of direction by the appellate court to enter judgments for the defendants, new trials should be ordered. Plaintiffs' counsel are not contending that the appellate court could not have directed judgments to be entered for the defendants on the record and under the provisions of Rule 50 (b) of the F. R. C. P. Their contention is rather that the simple reversal of the judgments for the plaintiffs does not, in the absence of further mandatory directions, authorize the entry of judgments for the defendants.

In construing the mandate of the Circuit Court of Appeals, the opinion may and should be considered, *Thornton* v. *Carter*, 8 Cir., 109 F. (2d) 316, 319, because it is a part of the mandate. *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 8 Cir., 106 F. (2nd) 891, 894.

In both the instant cases, the appellants assigned as error the overruling of the motions for directed verdict and the denial of the motions for judgment notwith-

standing. In the *Moss* case, the appellate court held that as a matter of law the plaintiff's decedent was guilty of contributory negligence, and in the *Hook* case, it held that "the proof fails to sustain the negligence alleged in the complaint." In other words, the upper court ruled in effect that the District Court should have directed verdicts or should have granted the motions for judgment *non obstante veredicto.*

That being so, when the Circuit Court of Appeals reverses the judgments, it is in effect saying that the rulings on the motions for judgment notwithstanding should be different than they were in the first instance.

It is my view that Rule 50 (b) was included in F. R. C. P. in order that unnecessary retrials may be avoided when the trial court erroneously overrules a motion for directed verdict. In that connection, the plaintiffs argue that they should be given the opportunity to adduce additional evidence to supply the deficiency found by the appellate court or to explain away the evidence found to bar the one plaintiff's recovery. The answer is that had the District Court ruled at the trial as the Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded.

The plaintiffs have cited *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co.*, 5 Cir., 127 F. (2d) 837, as authority for their position. Although one of the alleged errors in that case was a motion for directed verdict, the motion for judgment *non obstante veredicto* was not assigned as error, and the appellate court pointed out in its opinion that it "did not reverse or even review the judgments of the trial judge on the motions for judgment *non obstante veredicto.*" It further said, "The opinion mentions only the alleged errors prior to verdict." This is not the present situation. Here, the mo-

tions for judgment *non obstante veredicto* were assigned as error as were the motions for directed verdict, and, in my view, the appellate court reviewed the questions presented by these rulings and then reversed. Under Rule 50 (b), the question of law raised for later redetermination on a motion for judgment notwithstanding. This redetermination was made after verdict in the instant cases, and thereafter the Circuit Court reversed on grounds raised by these motions. Under such circumstances, the question now before the court must be resolved against the plaintiffs.

The Clerk is directed to enter judgments on the mandates in favor of the defendants.

Luther M. Swygert,
Judge.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

SEVENTH CIRCUIT

Nos. 9071, 9072. October Term and Session, 1946.

Appeals from the District Court of the United States for the Northern District of Indiana, Hammond Division; Luther M. Swygert, Judge.

Action by Josephine M. Moss, administratrix of the estate of Nicholas John Moss, deceased, against the Pennsylvania Railroad Company and action by Della Hook, administratrix of the estate of Jacob Hook, deceased, against the National Brick Company, a corporation. From judgments in favor of the defendants, 68 F. Supp. 740, the plaintiffs appeal.

Affirmed.

Owen W. Crumpacker, Jay E. Darlington and Frederick C. Crumpacker, all of Hammond, Ind., for appellants.

Fred E. Zollars, J. A. Bruggeman, and Phil McNagny, all of Fort Wayne, Ind. (Barrett, Barrett & McNagny, of Fort Wayne, Ind., of counsel), for Pennsylvania R. Co.

Robert H. Moore (of Moore, Regan & Goad) of Gary, Ind., and William Greene, of Chicago, Ill., for National Brick Co.

November 6, 1946.

Before Major, Kerne, and Minton, Circuit Judges.

Per Curiam.

These are second appeals in cases which were before this court in 146 F. 2d 673 and 150 F. 2d 184, where the facts are fully stated. In both cases the error assigned was the overruling of a motion for a directed verdict and the denial of a motion for judgment notwithstanding the verdict. In the *Moss* case this court held, as a matter of law, that plaintiff's decedent was guilty of contributory negligence, and in the *Hook* case, that proof failed to sustain the negligence alleged in the complaint. In both cases the opinion of the court concluded thus: "The judgment is reversed." Mandates were issued in which the District Court was commanded that "such proceedings be had in the cause, as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding."

In the District Court, after the filing of the mandates, plaintiffs made no offer to produce any evidence not before heard, but each plaintiff contended that because the judgment did not embody a direction to enter judgment for defendant a new trial should be ordered. The trial judge held that he could take no action contrary to either the letter or the spirit of the mandate, as explained by the opinion; that this court in each case had ruled that the District Court should have directed a verdict for the defendant or should have granted the motion for judgment notwithstanding the verdict. Accordingly he entered judgment in each case in favor of defendant.

We think the court correctly construed the opinions and mandates and properly disposed of appellants' contentions. *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. Ry.*, 8 Cir., 106 F. 2d 891; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. 1636; *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147; *Thornton* v. *Carter*, 8 Cir., 109

F. 2d 316; *Lowden* v. *Denton,* 8 Cir., 110 F. 2d 274, 278; *Conway* v. *O'Brien,* 2 Cir., 111 F. 2d 611, 613; *Brunet* v. *S. S. Kresge Co.,* 7 Cir., 115 F. 2d 713; *Southern R. Co.* v. *Bell,* 4 Cir., 114 F. 2d 341; and *Herzberg's Inc.* v. *Ocean Accident & Guarantee Corporation,* 8 Cir., 132 F. 2d 438. Compare *Madden Furniture, Inc.* v. *Metropolitan Life Ins. Co.,* 5 Cir., 127 F. 2d 837, in which case the overruling of the motion for judgment notwithstanding the verdict was not specified as error, and after the mandate had been filed, appellants offered to exhibit "evidence not before heard which might produce a different result".

Affirmed.

Rule 50. Motion for a Directed Verdict.

(b) RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.